

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

MAR 21 2007

COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

ERNESTO MENDEZ-CAÑEZ,

Appellant.

2 CA-CR 2005-0336  
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication  
Rule 111, Rules of  
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20041812

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General  
By Randall M. Howe and Diane Leigh Hunt

Tucson  
Attorneys for Appellee

Peter B. Keller

Tucson  
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 Following a jury trial, Ernesto Mendez-Cañez was convicted of unlawful transportation of marijuana for sale in violation of A.R.S. § 13-3405, conspiracy to commit a violation of § 13-3405, and unlawful possession of drug paraphernalia. The trial court sentenced him to concurrent prison terms totaling four years. The sole issue in this appeal is whether the trial court erred in denying Mendez-Cañez’s motion for a new trial made on the ground the trial court had erred in admitting certain testimony. We affirm.

¶2 We view the facts in the light most favorable to upholding the convictions. *State v. Carlos*, 199 Ariz. 273, ¶ 2, 17 P.3d 118, 120 (App. 2001). As part of an investigation spanning several months, law enforcement officers had been monitoring telephone calls that revealed a planned drug deal. On October 4, 2003, as a result of their investigation, officers stopped the vehicle Mendez-Cañez was driving, which was the middle car of a three-car convoy. Several bundles of marijuana were found in the vehicle, along with a roll of cellophane, a calculator, and a scale.

¶3 At trial, the following colloquy occurred during the prosecutor’s direct examination of a special agent with the Drug Enforcement Administration who had participated in the investigation:

[THE PROSECUTOR]: . . . Based on your cumulative knowledge in this case, included [sic] wiretapping thousands of phone calls during surveillance, doing interviews from people who have been arrested both in Arizona and outside of the State—including all of your ten years working drug cases—do you have an opinion about what—who the people were driving the three cars and the people that were intercepted on the phone, what their roles were in this particular drug transaction?

[MENDEZ-CAÑEZ’S ATTORNEY]: Your Honor, it’s gone [sic] to the ultimate conclusion, State vs. Lee[, 191 Ariz. 542, 959 P.2d 799 (1998)]—

THE COURT: Yeah. Overruled.

THE WITNESS: Each individual is intended for a specific role.

The witness then testified that drug deals involve buyers, brokers, and suppliers, and stated his opinion that Mendez-Cañez was one of the suppliers of the marijuana in this transaction.

¶4 In his motion for a new trial, Mendez-Cañez argued that this testimony constituted impermissible “‘profile’” testimony about “‘how drug smuggling is done, or how drug rings operate, to show how actions of a defendant were those of a guilty person.’” The trial court denied Mendez-Cañez’s motion. We review both a trial court’s denial of a motion for a new trial and its ruling on the admissibility of evidence for an abuse of discretion. *State v. Rutledge*, 205 Ariz. 7, ¶ 15, 66 P.3d 50, 53, *supp. op.*, 206 Ariz. 172, 76 P.3d 443 (2003).<sup>1</sup> We find none here.

¶5 Mendez-Cañez relies on *State v. Lee*, 191 Ariz. 542, 959 P.2d 799 (1998), to support his argument that the agent’s testimony constituted inadmissible drug courier profile evidence. In *Lee*, our supreme court defined a drug courier profile as “a loose assortment of general, often contradictory, characteristics and behaviors used by police officers to

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<sup>1</sup>We disagree with the state’s assertion on appeal that Mendez-Cañez raised his argument for the first time in his motion for a new trial and, thus, has waived all but fundamental error. His objection during trial was essentially the same as that urged in his new trial motion. He referred to the relevant authority and was clearly interrupted by the trial court before he could finish his objection. Thus, the issue is preserved for our review.

explain their reasons for stopping and questioning persons about possible illegal drug activity.” 191 Ariz. 542, ¶ 10, 959 P.2d at 801. The court noted that drug courier profile evidence is generally inadmissible as substantive proof of guilt because “the ‘use of profile evidence to indicate guilt . . . creates too high a risk that a defendant will be convicted not for what he did but for what others are doing.’” *Id.* ¶ 12, *quoting State v. Cifuentes*, 171 Ariz. 257, 257, 830 P.2d 469, 469 (App. 1991).

¶6 The witness’s testimony here was not impermissible profile evidence under *Lee*. The witness did not describe a profile of characteristics and behaviors shared by drug suppliers, much less improperly suggest that Mendez-Cañez must be guilty because he fit such a profile. *See id.* ¶¶ 12-19. The witness simply testified about the roles of those typically involved in an illegal drug transaction. He testified that someone must supply the marijuana in an illegal drug deal and that Mendez-Cañez was one of the suppliers in this case. At most, the testimony consisted of the witness’s general observations about drug trafficking based on his training and experience in law enforcement, providing context for the other evidence and assisting the jury in understanding the *modus operandi* in a complex case. *Lee* permits the use of such testimony. *Id.* ¶ 11; *see also United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1996) (noting certain testimony was not drug courier profile testimony and “was properly admitted to assist the jury in understanding *modus operandi* in a complex criminal case”). The trial court, therefore, did not abuse its discretion in admitting the testimony or in denying Mendez-Cañez’s motion for a new trial.

¶7 Even assuming portions of the agent’s testimony did constitute profile evidence, it did not comprise the state’s entire case against Mendez-Cañez, and the additional evidence was overwhelming. “Here, the presence of the drugs in the [passenger compartment] of the [vehicle he] was driving was sufficient, in and of itself, to support a conclusion beyond a reasonable doubt that he was knowingly transporting the drugs.” *Beijer v. Adams ex rel. County of Coconino*, 196 Ariz. 79, ¶ 25, 993 P.2d 1043, 1048 (App. 1999). At trial one of Mendez-Cañez’s codefendants testified that the vehicle Mendez-Cañez had been driving with the marijuana inside “was supposed to follow [her]” to where the marijuana was going to be delivered. From this evidence, separate and apart from the testimony Mendez-Cañez challenges, the jury reasonably could have concluded that he had conspired to transport marijuana for sale with at least one of the occupants in the other two vehicles involved in the drug transaction. *See State v. Bible*, 175 Ariz. 549, 602, 858 P.2d 1152, 1205 (1993) (jury is permitted to draw reasonable inferences from the evidence). Thus, any error, if error occurred, was harmless. *See id.* at 588, 858 P.2d at 1191 (error harmless if reviewing court can say, beyond a reasonable doubt, that it did not contribute to the verdict).

¶8 Mendez-Cañez’s convictions and sentences are affirmed.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge